No. 2541

United States Circuit Court of Appeals

For the Ninth Circuit

R. L. Sabin,

Petitioner,

vs.

Blake, McFall Co., a Corporation,
Knight Packing Co., a Corporation,
Hazelwood Co., a Corporation, and
Wm. H. Dryer and W. W. Bollam,
Partners Trading as Dryer, Bollam & Co.,
Respondents.

In the Matter of Equal Rights Company, Inc.,
Alleged Bankrupt.

Brief of Respondents

Petition for Revision of a certain order of the United States District Court for the District of Oregon.

Sidney Teiser, Attorney for Petitioner.

Seitz & Clark and Barge E. Leonard,
Attorneys for Respondents.

SCHWAB PRINTING COMPANY

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STATEMENT OF FACT.

The Equal Rights Grocery Company, Inc., conducted a small retail grocery store in St. Johns, Multnomah County, Oregon. Becoming financially involved and to prevent this petitioner from securing a preference on claims assigned to him and on

which action has been commenced, the petitioning creditors filed their petitions in bankruptcy, each under the strict ruling of the court being dismissed on motions made by this petitioner, similar to the one before the court. Thereafter an amended petition was filed which the alleged bankrupts answered, as shown on page 8, Abstract of Record. Said amended petition was dismissed November 16, 1914. Thereafter and by leave of court first had and obtained a second amended petition shown on page 14 of Abstract of Record was made and served upon the attorneys for the alleged bankrupt and this petitioner, on the 23rd day of November and filed the same day. The abstract shows this date to be November 25th. We believe this is due to some mistake. At most there was no appreciably delay and the petitioner has suffered no injury thereby.

Petitioner then filed his motion (page 22 and 23 Abstract of Record) to dismiss petition denominated as "Second Amended Petition." The court having heard counsel on said motion it was taken under advisement and by the decision of his Honor Judge Robert S. Bean, it was on December 24, ordered that said motion be denied, copy of which order is set forth, page 25, Abstract of Record. This order petitioner asks be revised in matters of law as shown in motion to dismiss, for reasons therein stated, which counsel for petitioner has arranged numerically on pages 4 and 5 of his brief which objections we will consider separately under the following

POINTS AND AUTHORITIES.

Objection Number I.

Paragraph VI, Page 26, Abstract of Record.

> *"That the said amended petition was not filed within the time allowed by the order permitting the amendment."*

This is a question within the sound discretion of the court, and the court being fully advised in the premises exercised its discretionary powers clearly within the statute in receiving respondents' petition and acting thereon.

In re R. L. Radke Co., 27 American Bankruptcy Reports 950, after stating facts very similar to the question in issue, the court said, at page 953:

> "My attention has not been called to any rule which requires the amended petition to be stricken from the files for such a default."

In the case of *Blackstone v. Everybodys Store,* 30 American Bankruptcy Reports, 497, from which we quote on page 501, relative to the discretionary power exercised by the court:

> "The statute expressly clothes the court with power to grant more time than the statutory five days. An application for an extension of time in a situation like this calls for the exercise of discretion, an extension being granted by the court in the first instance in each of the proceedings it must be accepted as a step taken in the field of discretion and one not to be disturbed except on the grounds of clear error involving injustice."

Objection Number II.

Paragraph III, Page 22, Abstract of Record.

> *"That said petition does not show that the alleged bankrupt is amenable to the provisions of the bankruptcy act."*

The respondent's allegations (shown on pages 14, 15, 16 and 17 Abstract of Record) are sufficient to render the alleged bankrupt amenable to Sections 4-a-b of the bankruptcy act as amended.

In section 4-B of the bankruptcy law of 1898, as amended in 1903 and 1910, any person except wage earners, tillers of the soil, municipal, railroads, insurance or banking corporations, owing debts to the amount of $1000.00 or upwards may be adjudged involuntary bankrupts, the amendment of 1903 states *"engaged principally* in manufacturing, trading, printing, publishing, mining or mercantile pursuits." We wish to note the amendment of 1910 while a superimposed statement of 1903 does not state that it need be *principally engaged* as in 1903 stated, but does define that *"any moneyed business or commercial corporation, except a municipal railroad, insurance or banking corporation owing debts to the amount of* $1000.00 *or over may be adjudged an involuntary bankrupt."*

Were we required to allege the bankrupt was *engaged principally* in a mercantile business, as to the statement of *engaged principally,* we have for the purpose of this motion, which has taken the place of a demurrer especially pleaded, shown (a)

that it is a corporation, (b) within the court's jurisdiction, and (c) has for six months next prior to the filing of the petition, had its principal place of business in the City of St. Johns, County of Multnomah and State of Oregon, and (d) as such a corporation was engaged in the *general retail merchandise business.*

Par. II of second amended petition as shown on page 15, Abstract of Record, shows that the alleged bankrupt is not within the excepted classes as mentioned by 4-B of the bankruptcy act of 1910, where the following named, wage earners, tillers of the soil, municipal railroads, insurance or banking corporations are enumerated, as not being amenable to the bankruptcy law as amended.

It is contended by counsel for petitioner that the rules of pleading govern. If this be true the statement that the alleged bankrupt was principally engaged in merchandise pursuits would be pleading a conclusion.

Whether a corporation is or is not principally engaged in manufacturing *is not a question of law but of fact* and must be shown by a preponderance of the evidence that the alleged bankrupt could be termed manufacturing, trading or mercantile.

T. E. Hill & Co. v. Contractors' Supply & Equipment Co., 24 Am. Bank. Rep. 84.

Walker Roofing, Etc. Co. v. Merchant & Evans, 23 Am. Bank. Rep. 185.

In 95 Fed. 271 in re San Gabriel Sanitarium. In the opinion given by Judge Wellborn he states that the Bankruptcy Act of March 2, 1867, the following words are construed in light of the Bankruptcy Law to mean. The word *mercantile* is defined thus at page 273:

> "Pertaining to merchandise or the business of merchants. (Webster's Dictionary), A merchant is one whose business it is to buy and sell merchandise and "merchandise is a term including all of the things which merchants sell, either retail or wholesale, as dry goods, hardware, groceries and drugs (Bouvirs Law Dictionary)."

Objection Number III.

Paragraph IV, Page 23, Abstract of Record.

> *"That the nature of the claim of Dryer, Bollam & Co., one of the petitioning creditors therein, is not properly or fully set forth, and that without the claim of the said petitioning creditor, the jurisdictional amount required to be held by the petitioning creditors by the Bankruptcy Act, as amended, viz., $500.00, would not be held by said petitioning creditors.*

That money due upon a stated account is a provable claim.

> "Section 57-A of the Bankruptcy Act provides that Proof of Claim shall consist of a statement under oath in writing signed by a creditor setting forth the claim, the consideration therefor and whether any, and, if so, what securities are held therefor and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

On page 20, Abstract of Record, is found the oath of W. H. Dryer, a member of the firm of Dryer, Bollam & Co.; that the statement of facts contained in said petition are true. The claim referred to is that of Dryer, Bollam & Co., a copartnership listed on page 16, Abstract of Record, the nature of said claim being money due upon a stated account rendered July 2, 1914, the consideration for said stated account was money due upon an open account from the alleged bankrupts, Equal Rights Company, as stated. The other requirements of Section 57-A are answered in the negative as to the preference, priorities and securities held in paragraphs III and IV, second amended petition shown on page 15, Abstract of Record.

Black on Bankruptcy, Sec. 160, as shown on page 396, states:

> "As to the degree of particularity required in describing the claim, it is held that they should be so fully expressed in the petition that the court may see on the face of it that they are provable claims, but the provision of the 57th section of the act 'requiring the consideration of a claim to be set forth and sworn to relates to the proof of the claim, and not to the averments of the petition.'"
>
> *In re Brett,* 130 Fed. 981; 12 Amer. Bank. Rep 492.

The fact that it is shown by the petition that the said claim is an account stated as shown on page 16 Abstract of Record. The creditors' amended petition is sufficiently supported, and it is not neces-

sary to give evidence of the original debt on the several items constituting the account.

Field v. Knapp, 108 N. Y. 87.

Coffee v. Williams, 16 N. Y. Hun. 106.

Truman v. Owens, 17 Ore. 523; 21 Pac. 665.

Daytona Bridge Co. v. Frank Bond, et al, 47 Fla. Page 136.

From which we quote, page 143, Judge Shackleford said:

> "While an account stated must be based upon previous dealings and transactions between the parties and while it is not necessary to support an action upon an account stated to show the nature of the original debt, or to prove the specific items constituting the account, it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of and concerning which an account was stated."

2 Chitty on Contracts, pages 961-962.

The Abstract of Record, at page 9, paragraph III, of the answer of the alleged bankrupt, admits the claims as set forth by the petitioning creditors and includes the claim of Dryer, Bollam & Co., a copartnership; that thereafter a stipulation was made as to said answer of the alleged bankrupts, which stipulation is shown on page 21, Abstract of Record, that the said answer referred to on page 9, of the Abstract of Record is to be considered an answer to the creditors' Second Amended Petition, and had the account of Dryer, Bollam & Co. not be-

come a stated account on July 2, 1914, the admission of the bankrupts in their answer filed herein on October 26th, 1914, is sufficient to render it an account stated as petitioner's motion to dismiss was filed December 4, 1914, subsequent to the stipulation filed November 25, 1914.

In the case of *Crawford v. Hutchinson,* reported in 38 Oregon, on page 580, Mr. Chief Justice Bean, after stating the facts, delivered the opinion from which we quote, on page 581:

> "It is clear therefore that by reason of the silent acquiesence of the defendant the account rendered by the plaintiff to them became an account stated, which can only be opened for fraud, error or mistake. * * * (Page 582). The rule upon this point seems to be that, where the correctness of the account presented is admitted, either expressly or by failure to object within a reasonable time, it will amount to an account stated as to everything included therein, although the person acknowledging its accuracy may have an offset thereto, arising out of some independent transaction."

In the case of *Fitzgerald v. First National Bank,* 114 Fed. Rep. 474, from which we quote at page 481:

> "And in the absence of fraud, mistake or undue advantage an account stated is conclusive, and estops the party which presents it from assailing its correctness."

Petillo v. Allan West Mission Co., 131 Fed. Rep. 680.

Atkinson v. Allen, 71 Fed. Rep. 58.

And, in our opinion, it should be at least as conclusive to an objecting creditor.

Objection Number IV.

As shown at paragraph V, on page 23, Abstract of Record.

> *"That said amended petition is not verified according to law and the requirements of the Bankruptcy Act, 1898, as amended."*

The defect of verification is not fatal to the petition, and is not jurisdictional, and should not warrant a dismissal of the petition.

In re Farthing, Vol. 29, Am. B. R. page 732, from which case we quote from page 744, after discussing the different forms prescribed by the Supreme Court, the court said with reference to verification:

> "While I am of the opinion that the verification does not comply with the official form, it is well settled that the defect is not fatal to the petition and it is not jurisdictional, and should not, because of infirmity, warrant a dismissal of the petition."
>
> *Green River Dep. Bank v. Craig,* 6 Am. Bk. Rep. 110 Fed. 137.

Section 18-C of the Bankruptcy Act, as amended provides:

> "All pleadings setting up matters of fact shall be verified under oath."

It is our contention that the verification is sufficient (if it was not sufficient the petitioner should

move for a rule to require a proper verification, and if such rule is not complied with, to move to dismiss the petition for that reason.

Green River Dep. Bank v. Craig, 6 Am. Bk. Rep. 381.

Each of the petitioning creditors signing said petition have stated under oath that the statement of facts contained in the petition is true, and as is added, "As I verily believe" is not a qualification on the part of affiant. It is our contention that the statement "as I verily believe" is merely surplusage and does not render the statement less authentic, more than had affiant said "So help me God," or any other phrase expressive of his sincerity.

In conclusion we submit that the Respondent's Petition has stated facts sufficient to support the decision of the District Court; that the alleged bankrupt by its answer admits all of the material allegations contained in the petition; that the objections of the petitioner are technical and pertain to form only and do not go the merits of the cause; that the decision of the District Court herein should be affirmed.

Respectfully submitted,

SEITZ & CLARK,

MANNING, SLATER & LEONARD,

Attorneys for Petitioners.